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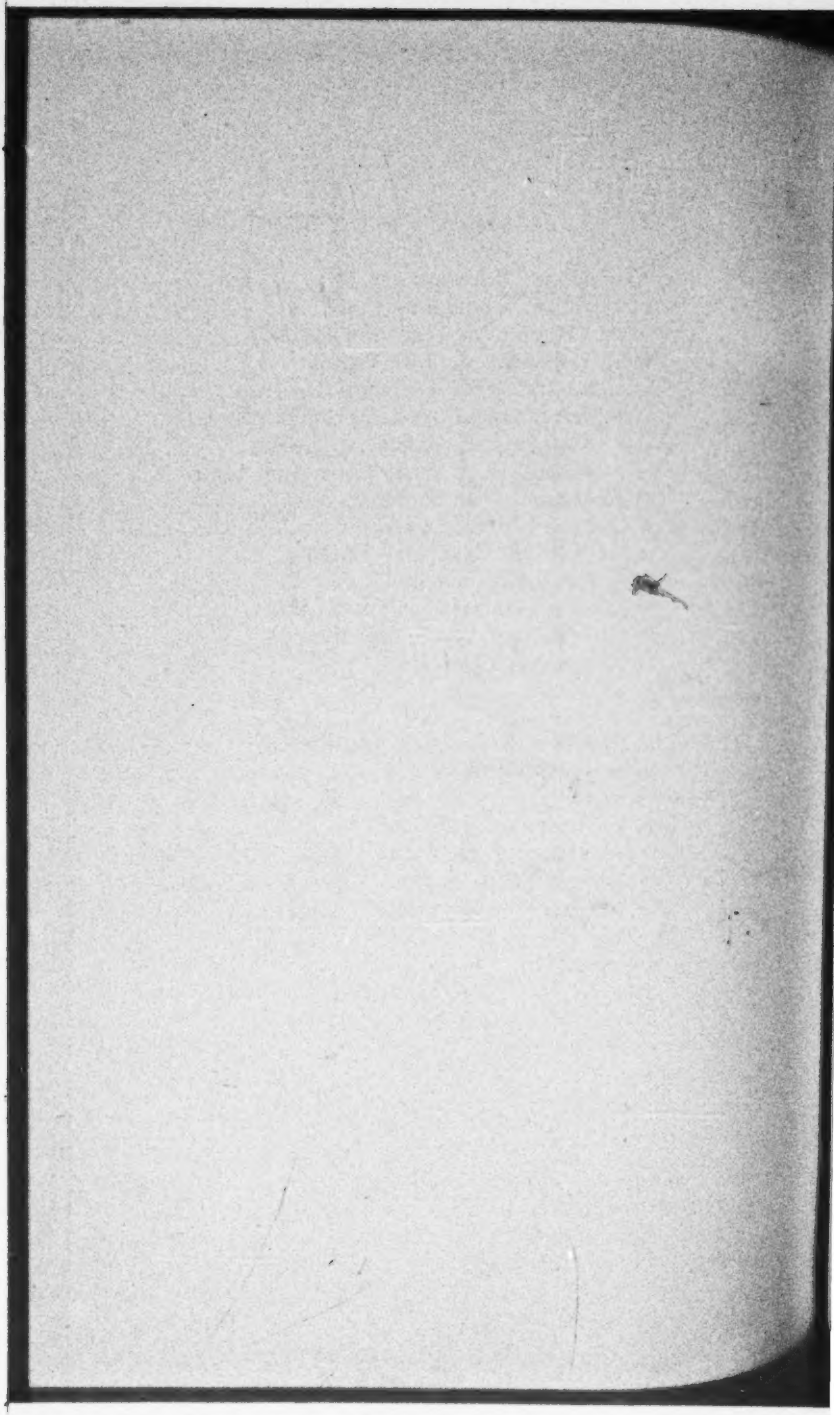

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1923.

STATE OF NEW MEXICO

vs.

STATE OF TEXAS

No. 3, Original

REPLY BRIEF OF COMPLAINANT.

Adhering to the order of presentation of the case of New Mexico, adopted in its original brief, we will first take up the consideration of Part II of defendants Brief. In doing so, however, I will not attempt to make any detailed reply, it will content myself with pointing out some of the gross inaccuracies which disfigure defendant's Brief, and which indicate its unreliable character. More than this seems unnecessary, as that Brief makes little attempt to answer the matters set out in our original Brief.

Before doing this, however, the attention of the court is invited to part I of complainant's original Brief, and asked to make a comparison of it with Part II of defendant's Brief. It will be found that in complainants Brief there appears a careful, conscientious effort to state fully the oral testimony of the witnesses who testified for complainant as to the location of the river, and to set out everything, even where the testimony appeared to favor the defendant, while in Part II of defendant's Brief, no such attempt is made, but quotations are made of parts of the testimony which counsel evidently believe to be favorable to their contention, with unjustifiable innuendoes as to complainant's witnesses, and misstatements,-unintentional, of course, due to carelessness,-of what their testimony is.

At page 5 of Part II of defendant's Brief we find the following:-

"An examination of the testimony of these witnesses shows if any thing, that Juan de Dios Sais, Jose Garcia, Florencio Lucero, Jesus Enriquez and Victoriano Duran placed the river of 1850 adjacent to the western foothills near Piedras Paradas, Corral de Tapia, La Cobrena, Corral de Trosas Altos Cuarnoes, and the hills along Santa Teresa and near the old town of Alamos".

Before proceeding further, we call attention to the fact, as indicating the carelessness of counsel for defendant, that there is nowhere mentioned in the record any "old town of Alamos". Presumably "Amoles" is what is meant. That is unimportant.

What is important, however, is the grossly inaccurate statement as to the testimony of the five witnesses named. It is not true that they "placed the river of 1850 adjacent to the western foothills near Piedras Paradas" and the other places named, which are near the western side of the valley. "Altos Cuarnoes" should be "Altos de los Cuarones," so named because brothers of the name of Cuaron were there killed by Indians.

Beginning with Juan de Dios Sais, the attention of the court is invited to the statement of his testimony at pages 89 to 96, and 103 to 111 of Part I of the Brief of New Mexico which we assert to be full and complete as will appear by comparison with pages 323 to 345 and 369 to 387 of the Record.

The nearest approach to any thing like what is asserted about him, will be found noted on page 94 of New Mexico's Brief, where it is stated "Ever since he knew that place he never knew any houses, except some old walls at the Corral de Tapia where they got water from the river, which was near, but he does not know when the river flowed near the Corral de Tapia." Next after that, appears the following: "When he knew it for the first time, the river ran through the bosque and was out far from the Corral de Tapia, in the bosque." Again, on page 95 he is shown to have said "At that early time, he never knew the river to run at Piedras Paradas", and on page 105 of that Brief, he is represented as saying "The river flowed, when he was a boy, to the side of the Yerba del Manso, where the sun sets," but, as there stated, there was evidently some misunderstanding. This will be clear by reading page 373 of the Record. And we should also read his testimony on pages 338-9, 371-2, 373-4 of the record, from which it will plainly appear that the assertion that his testimony shows that he placed the river of 1850 adjacent to the western foot hills near Piedras Paradas etc. is without any foundation.

Next, let us take the testimony of Jose Garcia, a fair condensation of which will be found at pages 595-6 to 610 of our original Brief, and nothing can be found to justify the statement that he placed the river of 1850 adjacent to the foot hills near Piedras Paradas. At page 1489 of the Record, he does testify that the river struck the Piedras de Amolar, and it is charitable to believe that counsel for defendant confused Piedras de Amolar, which are be-

low White's Ranch and Muleros, near the present Courchesne Bridge, and on the east side of the valley not far from the beginning of the Canon, with the Piedras Pardas, which are much farther to the west, and perhaps as much as two miles distant.

At pages 1517-8 of the Record, he testifies that he saw a whirlpool at the Piedras Paradas after the river changed there, and that there was no river running there when he was still young and knew that country.

It is of interest to note that this witness testifies to seeing the prisoners taken through El Paso in carts, who went on to Chihuahua, when he was seven or eight years old, which must have been in 1841. (Page 1521 of Record.)

Attention is called to the curious statement of counsel for Texas, at page 5 of Part II of their Brief, as showing the carelessness with which that Brief was prepared, that Jose Enriquez "did not testify unless he is the same as Jesus Enriquez", when Jesus Enriquez, at page 1741 of the record, testifies that he was born in 1844 and that his brother Jose was born in 1850, which sufficiently accounts for Jose not being called as a witness, and this witness, Jose Garcia, at page 1495 testifies about Jesus and Jose Enriquez, both still living, his cousins, (p. 1482 of Record,) Jose being younger than Jesus, and he, the witness, being about 16 years older than Jesus, which would make him 12 or 13 years old when the Texan prisoners went through El Paso, in 1841.

There is absolutely nothing in his testimony, which runs from page 1478 to page 1524 of the Record, to indicate that he "placed the river of 1850, adjacent to the western foothills near Piedras Paradas".

The next witness who, according to counsel for Texas, placed the river of 1850 near Piedras Paradas, is Florencio Lucero, and there is some slight foundation for the statement as to him as will appear by reference to the Brief for New Mexcico at page 394, where it is set out that he remembered the Loma de Arena on the west side of the river, and when the river ran by that place and that when he first knew the river, it ran by that Loma, and that in those early days the river ran by Corral de Tapia, and that there was a whirlpool at Piedras Paradas when he first knew the river. We call attention to this as showing the care with which the testimony of witnesses, was stated in our original Brief, even when at all adverse to New Mexico. In this connection, however, we now invite attention to the fact that the witness made other and inconsistent statements, as that from the river to Piedras Paradas may have been

about a mile, (page 391 of our original Brief and page 1074 of the record;) and that the river was close to Duraznitos where there was a peach tree (page 390 of our original Brief and page 1073 of the Record.) The river could not have been at those places and also at Piedras Paradas and Corral de Tapia, which are far to the west. An examination of his testimony will lead to the conclusion that he was testifying to things as he remembered them but that the times fixed are not certain.

He did say that the river which ran near the Loma de Arena was the new river (pages 394 and 400 of our original Brief and 1080 of the Record) which is explained by his statement that the river destroyed the houses at Amoles and that was the year of the Texans (page 391 of our original Brief and page 1075 of the Record) and after the flood the river ran by Nombre de Dios and La Union. This harmonizes with the testimony of other witnesses, by whom it is shown that the year of the Texans was 1862.

After the great flood, which destroyed Amoles, the river did run near the places on the west side of the valley, but not before, and this old man whose memory is not of the best, to a slight extent confused the later river with his earlier recollections.

The next witness is Jesus Enriquez, the statement of whose testimony in our original Brief runs from page 699 to 711. The nearest approch to a foundation for the statement as to him, is shown at page 705 of our Brief, where it is stated that he said the river channel was far to the west of the Island of Jose Maria Garcia. This is based upon what appears on page 1747 of our Record, where it is not very clear. He says "the river was part of it to the west", and "Another was towards the south". There is not another word to sustain counsels assertion. At page 1754 of the Record, he says it was only an estero, on the west side of the island. And at page 1743 he says there was no river bed at the Piedras Paradas and there was only bosque, and at pages 1754-5, there was no channel at Piedras Paradras, and the nearest water was a thousand yards away. He remembers when the river destroyed the town of Amoles, and gives the names of 48 persons who lived there (pages 1737-8 of the Record.)

The last witness who, as counsel for Texas assert, "placed the river of 1850 adjacent to the western foothills near Piedras Paradas" and other places on the west side of the valley, is Victoriano Durna. A careful re-reading of the condensation of his testimony in our original Brief running from page 320 to page 344, and of his testimony in the record from page 909 to page 974, does not disclose the slightest foundation for this assertion as far

as he is concerned. This is a mere illustration of the reckless haste and carelessness with which defendant's Brief has been prepared although counsel took more than two years after the Brief for New Mexico was printed and served before they had their Brief printed.

It is not my intention to make any suggestion of bad faith on the part of the counsel for Texas on account of the manifest errors to be found in their Brief, as I do not believe that would be justifiable, and I call attention to some of those errors which characterize the greater part of their work, merely to show that it is unsafe for the court to rely upon it to any great extent in the consideration of the case, while I assert that, in our original Brief, the utmost possible care has been taken to be accurate, and, especially with reference to the whole of the testimony of the witnesses who testified as to their personal knowledge of the location of the river in their early life, up to the time of the great change in 1864, to give a careful and fair statement of what the Record discloses without regard to whether it is adverse or favorable. Counsel for Texas, in their Brief, have pursued an opposite course, seeking only to set out what they think is favorable to Texas and adverse to New Mexico,-a course which cannot be of great assistance to the court.

At page 4 Part II of defendant's Brief, near the top of the page, there is a paragraph which begins thus:—

"He stated that in his efforts to locate the river of 1850 he did not go beyond an investigation made by the old Mexicans nor look for any other source of information". It is not clear from what precedes this, whether it refers to Post or Turley, but examination of page 2046 of the Record, to which reference is made at the end of the sentence, shows that "He" is neither Post nor Turley, but is Steen, whose testimony runs from page 2014 to 2110. Merely another inaccuracy.

At page 7 of Part II of defendant's Brief, counsel, in an effort, which we submit, is unsuccessful, to cast some discredit upon Eugene Van Patten, a witness for complainant, say that he "had received compensation from Senator Catron and Mr Austin for quite a while and would continue to do so as long as the case lasted", with a reference to page 705 of the record. That is correct so far as his having been employed by Catron and Austin, (for a short time only.) but there is no foundation for the statement that he would continue to receive pay from these persons as long as the case lasted. This is apparent from the Record at pages 705 to 710. Reference is made to this, not as indicating bad faith on the part of counsel, but as one of the many inaccracies which disfigure their Brief, due to nothing worse than carelessness.

It is submitted to the Court that there is not sufficient in Part II of defendant's Brief to meet what is contained in Part I of the complainant's Brief, or seriously to affect the claim at page 804 of Part I, that the testimony satifactorily proves "that from the time of the earliest recollection of these old men", (whose ages are set out on the next page of that Part I,) "down to the time of the great flood which changed the course of the river in 1864 so as to put Mesilla on the east side of the river and to destroy several small towns below that place, the river ran near the hills on the east side of the Valley between Alamitos and White's Ranch, and in some places, where the railroad is now, while the road on that side of the river was on the hills, generally, because the river was so close to the foot of the hills as to make it necessary to keep up on the high ground, and it was only after that great flood that the river ran anywhere near the west side of the valley as is now claimed by defendant".

Coming now to a consideration of Part I of defendant's Brief, the court will find it even more disfigured by errors and inaccuracies than is Part II to which attention has been given up to this point. I had been in this case from the beginning, and thought that I had sufficient familiarity with it to read with understanding what was offered by defendant in Part I of its Brief, but the reading thereof reduced me to a confusion of mind, bordering upon insanity, of which I felt much ashamed. When I found on page 121 a statement of what was the testimony of "plaintiff's expert," Owen, reason tottered. I recalled that I had a witness named Owen, who was a surveyor, but I could not imagine that he had given such testimony. After a little, however, I came to myself, and realized it was another Owen who was meant.

As to my inability to appreciate or understand this Part I of defendant's Brief, I make the kindly suggestion to counsel for defendant that they adopt in substance, the answer of Augusta Evans to critics who said they could not understand her stories, which was to the effect that it was all she could do to write the stories without furnishing brains for the critics to understand them.

I did, however, read the whole of Part I, although it was dreary work, and concluded that it would be useless to attempt to reply to it in detail, especially as it is not, in any proper sense, an answer to PartII of complainants Brief, upon which complainant can safely rely as clearly presenting its case so far as matters of a technical-engineering character are concerned, which are fully presented in 100 printed pages while the incoherent, confusing and inaccurate Part I of defendant's Brief, covers 331 pages.

Let us then content ourselves by calling attention to errors, and some of them unimportant, apparent on the pages of that Part I as showing the carelessness and inaccuracy with which it has been prepared.

They are only those which stood out clearly and offensively upon a cursory examination, and it may well be believed that further investigation would greatly increase the number, but time is of some importance in this life.

On page 69, in a quotation from Clark's report we read "There inscriptions were cut in on the stone wood," which should be "These inscriptions were cut in on the stone or wood".

On the same page, in the paragraph numbered 4, we find "monuments" transmogrified into "mountains".

On page 87, it is stated that "The Treaty of Guadalupe Hidalgo fixed the southern and western boundary of the United States along the middle of the channel of the Rio Grande up said stream as far as its intersection with parallel 32 degrees and 22 minutes north latitude defined as the point from which the boundary proceeded from said river to the Pacific". The treaty did not do any such thing, but provided only that the channel of the Rio Grande should be the boundary from its mouth up to the southern boundary of New Mexico. This is a fair sample.

At page 150 appears the following extraordinary statement:—

"Witness Campbell stated that he found nothing at stations 1 and 2 that resembled a stone monument, or a monument of any kind, except a few stones scattered about at station 1, and a pile of stones at station 2, which had been placed there by engineer Owen during recent work on the parallel. Plaintiff's witnesses mistook this latter pile of stones for Clarks station 2. (. 2554.")

For the statement in the last sentence above quoted, not the slightest foundation can be found anywhere in the Record. Bearing in mind that Campbell and Owen are defendant's expert witnesses, and that they never went into the field to do any work until after Post, Steen and Turley, expert witnesses for complainant, had fully testified, closing in March, 1914, when Campbell and Owen went forth, guided by complainants testimony, and went over the same ground as Post, Steen and Turley. Long before Campbell and Owen took the field, Post (at page 1781 of the Record) had testified to the location of station 2, and about the stones there, as also Steen (at pages 2032-3 of the Record.) and Turley (at page 2110 of the Record. If Owen, before he went

into the field at all, placed any stones which these three witnesses found, he must have had a prevision of extraordinary character. Moreover, Campbell at page 2554 of the Record, is testifying about appearances at an entirely different place from the one described by Post, Steen and Turley. He testifies about a place on the base of what he calls a sand ridge at its southern end, while Post et al. testify about a place near the middle of a sand ridge, as shown on Clark's field sketch, a copy of which, marked 5140, appears after printed page 3066 of the Record, and on the second page before page 3067, and by another copy marked 5364 opposite printed page 3180 of the Record. It is however true that Owen at page 2688-9 says he put some stones on a sand ridge, back in 1903 or 1904, but he says it was "the same hill where we have located Clark's station two"

On the same page 150, near the foot of the page is the following:

"Witness Owen describes the origin history and character of these stones (R. 2688-2689.) This utterly disproves the supposed connection of such stones with Clark monument No. 1." Reference to those pages 2688-9 of the Record, shows that there is nothing there about Clark's Monument No. 1.

On page 134 of said Part I, in a quotation from Owen's testimony appears the statement that Clark's monument one, was not made a triangulation point, and therefore it was necessary to connect monument one with some triangulation point by measurement.

If it were not a triangulation point, how was it of any value in locating the boundary? Can there be any greater absurdity than the position that Clark's initial monument of his great survey, was not a triangulation point? If located at station one where the remains of a monument were found by Post, (and other monuments are located at stations) it becomes clearly a triangulation point, just as are monuments 2, 3, 4, & 5 at stations 2, 3, 4 &, 8.

At page 165 of said Part I reference is made to defendant's exhibit 3 as showing the location of the river in the area in dispute. That exhibit is a map showing the boundary between the United States and Mexico as agreed upon under the Gadsden Treaty, that is, as to the location of the parallel of 31° 47' of north latitude, concerning which there is not, and cannot be, any dispute. Attention is invited to complainant's objections on pages 2257-8-9 of the Record as showing why this exhibit and exhibits 2, 4, 5, 6 and 7 are of no value in the present case.

At this point, it is proper to call attention also to the fact that counsel for Texas devote much space to operations after 1853, under the Gadsden Treaty, not a particle of which is relevant to anything in this case with the possible exception of the monument on the west side of the Rio Grande to mark the boundary on the parallel of 31° 47', as that monument is of some importance in connection with the work of re-establishing Clark's preliminary triangulation from Frontera north to the 32nd parallel. It is to be noted that on Clark's incomplete and inaccurate map No. 1, this monument is placed on the east side of the river, when as a matter of fact, shown by all of the expert witnesses in this case, it is on the west side of the river.

On page 173 of said Part I in an attempt to make a quotation from page 2246 of the Record, the word "other" is changed to "further", and the sentence is otherwise so mutilated as to deprive it of the meaning which is apparent in the original.

On page 178 of said Part I, near the foot of the page, "counsel for defendant" should be "counsel for complainant."

On page 193 of said Part I it is stated that "experts for plaintiff admit that Diaz in 1852, ran out the sinuosities of the Rio river (sic,) which is not true. Complainant and its experts do not admit that Diaz ever did anything above El Paso. Our position is clearly stated at page 81 of Part Two of New Mexico's original Brief, and on page 66 to 80, where it is shown how the pretended Diaz record discredited itself.

On page 266 of said Part I of defendant's Brief, the sentence beginning at the foot of the page, is unintelligible, but examination of page 2928 of the Record shows that it can be made intelligible by changing one word "being" to "and" and improved by another change.

On page 233 of the said Part I, near the foot of the page, "them stations" ought to be "these stations" or "those stations".

On page 266 of said Part I, near the foot of the page, "defendants exhibit C" ought to be "complainant's exhibit C".

On page 274 of said Part I, mention is made of "defendant's witness Post" although defendant never had a witness of that name.

On page 308 of said Part I, "defendant's exhibits" should be "complainant's exhibits".

On page 308 of said Part I, the sentence beginning " in answer to the question", is inaccurate and misleading, as will appear

by reference to the Record at pages 2924-5, where it is clear that New Mexico's position, as stated, was that maps made by Anson Mills "were imaginary and conjectural and not based on anything", and not, as counsel state it, that the Mills map shown on Plaintiff's Exhibit No. 65 "was conjectural and not based on any thing" In other words the original Mills map, correctly reproduced on Exhibit 65, was of that worthless character.

In closing, it is respectfully submitted that enough has been shown as to the unsatisfactory and inaccurate character of Defendant's Brief as to demonstrate the futility of attempting any detailed reply thereto. Such an attempt would involve what a professional brother in New Mexico stigmatized, in a moment of haste, as "a wasteless use of time" referring to the prosecution of a case where he appeared for the defense.

Frank W. Clancy,

Special Counsel for Complainant.